

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

In re: PHARMACEUTICAL INDUSTRY )  
AVERAGE WHOLESALE PRICE )  
LITIGATION ) MDL No. 1456  
 ) Civil Action No. 01-12257-PBS  
 )  
**THIS DOCUMENT RELATES TO:** ) Hon. Patti B. Saris  
 )  
*United States of America, ex rel. Ven-a-Care )  
of the Florida Keys, Inc. v. Abbott )  
Laboratories, Inc., )  
CIVIL ACTION NO. 06-CV-11337-PBS )*

**CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT AND OPPOSITION TO  
ABBOTT LABORATORIES INC.'S PARTIAL MOTION FOR SUMMARY JUDGMENT**

The United States opposes the motion for summary judgment filed by defendants Abbott Laboratories Inc. (Abbott). Docket No. 6185. The United States further cross-moves for partial summary judgment under the False Claims Act (FCA), 31 U.S.C. §§ 3729-3733, against Abbott that (1) Abbott's reported average wholesale prices ("AWPs") for the Subject Drugs were false; (2) Abbott "knowingly" reported such false prices under the FCA; (3) Abbott's false AWPs for the Subject Drugs constituted false statements and caused the submission of false claims to the Medicaid program and caused the State programs to submit false claims to the federal government for federal monies; and also that (5) Abbott's Sixth (release), Eleventh (laches, estoppel and waiver), Twenty-Fifth (a failure to mitigate damages), Thirty-Eighth (government knowledge), and Forty-First (contributory or comparative fault) Affirmative Defenses do not absolve Abbott of liability under the FCA.

The United States is filing an accompanying brief detailing issues of law that are common to the three cases in which the United States intervened, as well as a "common" L.R. 56.1 Statement of Undisputed Facts. In opposition to Abbott's Motion for Summary Judgment and in

support of its own motion, the United States files the accompanying Memorandum of Law, focusing on applying the law to the facts in the Abbott case. The United States also submits its Response to the Abbott Local Rule 56.1 Statement; Declaration of Mark A. Lavine transmitting Documents Relied On in the United States' Cross-Motion for Summary Judgment and in the United States' Response to the Abbott Local Rule 56.1 Statement; and the United States' Local Rule 56.1 Statement of Undisputed Material Facts of Record.

WHEREFORE the United States asks that this Motion be granted and that the Court grant summary judgment in favor of the United States that:

- (1) Abbott's reported average wholesale prices ("AWPs") for the Subject Drugs were false;
- (2) Abbott "knowingly" reported such false prices under the FCA;
- (4) Abbott's false AWPs for the Subject Drugs constituted false statements and caused the submission of false claims to the Medicaid program and caused the State programs to submit false claims to the federal government for federal monies; and
- (5) Abbott's Sixth (release), Eleventh (laches, estoppel and waiver), Twenty-Fifth (a failure to mitigate damages), Thirty-Eighth (government knowledge), and Forty-First (contributory or comparative fault) Affirmative Defense of failure to mitigate and consent does not absolve Abbott of liability under the FCA.

The grounds for this motion are set forth in the accompanying United States' Consolidated Memorandum of Law in Support of Motion For Partial Summary Judgment and in Opposition to Defendants' Motion For Partial Summary Judgment and the United States' Common Memorandum of Law in Support of Cross-Motions for Partial Summary Judgment and in Opposition to the Defendants' Motions for Summary Judgment. The United States also submits a Local Rule 56.1 Statement of Undisputed Material Facts as to Dey, together with exhibits thereto, and a Local Rule 56.1 Statement of Undisputed Material Facts Common to All Defendants, together with exhibits thereto. Relator joins in this Motion.

Respectfully submitted,

For the United States of America,

MICHAEL K. LOUCKS  
ACTING UNITED STATES ATTORNEY

---

George B. Henderson, II  
Assistant U.S. Attorney  
John Joseph Moakley U.S. Courthouse  
Suite 9200, 1 Courthouse Way  
Boston, MA 02210  
Phone: (617) 748-3398  
Fax: (617) 748-3272

JEFFREY H. SLOMAN  
ACTING UNITED STATES ATTORNEY  
SOUTHERN DISTRICT OF FLORIDA

---

/s Mark Lavine  
\_\_\_\_\_  
Mark A. Lavine  
Ann St. Peter-Griffith  
Special Assistant U.S. Attorneys  
99 N.E. 4th Street, 3rd Floor  
Miami, FL 33132  
Phone: (305) 961-9003  
Fax: (305) 536-4101

For the relator, Ven-A-Care of the Florida  
Keys, Inc.,

JAMES J. BREEN  
The Breen Law Firm, P.A.  
5755 North Point Parkway  
Alpharetta, Georgia 30022  
Phone (770) 740-0008  
SUSAN S. THOMAS  
GARY L. AZORSKY  
ROSLYN G. POLLACK  
Berger & Montague, P.C.  
1622 Locust Street  
Philadelphia, PA 19103  
Telephone: 215-875-3000

MICHAEL F. HERTZ  
DEPUTY ASSISTANT ATTORNEY  
GENERAL

---

/s/ Gejaa Gobena  
\_\_\_\_\_  
Joyce R. Branda  
Daniel R. Anderson  
Renée Brooker  
Justin Draycott  
Gejaa T. Gobena  
Rebecca Ford  
Elizabeth Strawn  
Civil Division  
Commercial Litigation Branch  
P. O. Box 261  
Ben Franklin Station  
Washington, D.C. 20044  
Phone: (202) 307-1088  
Fax: (202) 307-3852

I hereby certify that I have this day caused an electronic copy of the above **UNITED STATES' CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT AND OPPOSITION TO ABBOTT LABORATORIES INC.'S PARTIAL MOTION FOR SUMMARY JUDGMENT** to be served on all counsel of record via electronic service pursuant to Paragraph 11 of Case Management Order No. 2 by sending a copy to LexisNexis File & Serve for posting and notification to all parties.

/s/ Mark Lavine

Dated: July 24, 2009

Mark Lavine